MARIL-RIONEBEL (M) SDN BHD & ANOR

v.

PERDANA MERCHANT BANKERS BHD & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD J
[CIVIL APPEAL NOS: W-02-808-2000, W-02-809-2000, W-02-784-2000, W-02-783-2000, W-02-481-1999]
11 APRIL 2001

CIVIL PROCEDURE: *Appeal - Parties - Procedure - Proper party to make application for stay pending appeal - Whether proper of appellant to bring several appeals in respect of one suit - Stay of winding-up petition pending outcome of other suits - Bona fides of appellant*

CIVIL PROCEDURE: *Execution - Winding up - Whether presentation of winding-up petition a form of execution*

CIVIL PROCEDURE: *Amendment - Petition - Winding-up - Exercise of court's discretion*

CIVIL PROCEDURE: *Irregularity - Winding-up petition - Affidavit of truth sworn before petition - Whether curable*

CIVIL PROCEDURE: *Res judicata - Cross-examination - Winding-up petition - Application to cross-examine deponent on matter already decided at appellate level - Whether an abuse of process*

COMPANY LAW: *Winding-up - Petition - Whether more than one petition may be presented - Whether petition a form of execution - Companies (Winding-up) Rules 1972, r. 33*

The respondent had obtained a winding-up order ('the order') against the first appellant ('the appellant'). Due to the effect of a judgment of the Court of Appeal in another matter, the second appellant, Anafartalar Caddesi Sdn Bhd, a contributory of the first appellant, applied for a stay of execution of the order to the Court of Appeal. The court permitted the second appellant to be added as a co-appellant and stayed execution of the order.

The appellant had taken several steps by way of different applications to resist the winding-up petition in the High Court. The main appeals were against the High Court's decisions: (i) to grant the order although there was another petition by another creditor; (ii) to refuse to stay the winding-up petition although there were two suits filed by the appellant impeaching the judgment on which the petition was based; (iii) to grant an amendment to the respondent's petition; (iv) to refuse to strike out the petition although the affidavit of truth was sworn before the petition; and (v) to refuse to order cross-examination of the deponent of the respondent's affidavits.

Held:

Per Gopal Sri Ram JCA

[1] A company that has been ordered to be wound up has a right to appeal against that order and is entitled to apply for a stay of execution. As such, the proper party to make an application for stay was the appellant itself and any decision to the contrary was wrong and should not be followed. Sections 4 and 253(2) of the Companies Act 1965 and ss. 44(1) and 67(1) of the Courts of Judicature Act 1964 were clear statutory provisions for such principles.

[2] The unhealthy trend for lawyers to raise several points of appeal by several applications or preliminary objections constituted an abuse of the court's process. A litigant must take all his grounds in opposition to a matter in one go and cannot present his case in instalments. In the present case, the grounds of opposition to the respondent's petition could have been taken on a single application, which would have resulted in just one judgment of the High Court.

[3] It is settled law that more than one winding-up petition may be presented against a company. Rule 33 of the Companies (Winding-up) Rules 1972 ('the Rules') further allows a creditor to have himself substituted for a lethargic petitioner. The winding-up petition also did not offend s. 224 of the Companies Act 1965 as it was not an execution and was not based on any judgment of the court but on the company's inability to pay its debts.

[4] There were no grounds to warrant a stay of the petition as the judgment sought to be impeached was unsuccessfully appealed to the Supreme Court and there was no *bona fide* dispute based on substantial grounds having regard to the background facts.

[5] Although the Rules require the affidavit of truth to be sworn after the petition, the court may overlook procedural irregularities in the interests of justice, more so in cases where there was no question of serious injustice to anyone.

[6] The power to allow amendments is a discretion which is to be exercised liberally in the interests of justice. In this case, any reasonable tribunal would have acted similarly.

[7] The subject matter of cross-examination concerned the correctness of summary judgment entered against the appellant and tested at appellate level. This would have been a re-opening of a cause already disposed of to finality and therefore clearly an abuse of process.

Per Abdul Hamid Mohamad JCA

[1] The unhealthy trend among respondents in winding-up petitions is to make all kinds of interlocutory application which would stall the hearing of the petition proper. It was therefore timely that the court has come out strongly against such practice.

[Appeals dismissed; stay of execution pending application for leave to appeal to the Federal Court refused.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Penentang telah mendapatkan perintah pergulungan syarikat ('selepas ini perintah tersebut') terhadap perayu pertama ('perayu'). Kesan daripada keputusan Mahkamah Rayuan dalam satu kes lain, perayu kedua, Anafartalar Caddesi Sdn Bhd, sertaan daripada perayu pertama, memohon perintah untuk pergantungan pelaksanaan daripada Mahkamah Rayuan. Mahkamah membenarkan perayu kedua dimasukkan sebagai perayu sertaan dan perintah untuk pergantungan pelaksanaan.

Perayu telah mengambil beberapa langkah melalui permohonan yang berbeza-beza bagi menentang petisyen pergulungan syarikat di Mahkamah Tinggi. Rayuan utama adalah terhadap keputusan-keputusan Mahkamah Tinggi iaitu: (i) membenarkan perintah walaupun terdapat petisyen daripada penghutang lain; (ii) tidak membenarkan pergantunggan pelaksanaan petisyen pergulungan syarikat walaupun terdapat dua tindakan yang difailkan oleh perayu mencabar keputusan dimana petisyen itu disandarkan; (iii) membenarkan pindaan terhadap petisyen penentang; (iv) tidak membenarkan petisyen itu dibatalkan walaupun kebenaran affidavit diangkat sumpah sebelum petisyen; dan (v) tidak membenarkan perintah untuk menyoal balas pembuat affidavit bagi pihak penentang.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Syarikat yang telah diperintahkan untuk digulungkan mempunyai hak untuk merayu terhadap perintah tersebut dan berhak untuk memohon pergantungan pelaksanaan. Oleh itu, pihak yang sesuai untuk membuat permohonan itu adalah perayu sendiri dan mana-mana keputusan yang bertentangan tidak patut diikuti. Seksyen-seksyen 4 dan 253(2) Akta Syarikat 1965 dan ss. 44(1) dan 67(1) Akta Mahkamah Kehakiman 1964 menyatakan dengan jelas prinsip-prinsip tersebut.

[2] Tradisi yang tidak sihat bagi peguam-peguam yang membangkitkan beberapa perkara dalam sesuatu rayuan atau melalui bantahan awal boleh dianggap sebagai menyalahgunakan proses mahkamah. Litigan hendaklah membawa kesemua dasar-dasar untuk menentang kesnya dalam satu masa dan tidak secara berperingkat-peringkat. Dalam kes ini, dasar untuk menentang petisyen penentang boleh dibuat dalam satu permohonan sahaja dimana akhirnya satu keputusan daripada Mahkamah Tinggi sahaja akan diperolehi.

[3] Telah menjadi tradisi undang-undang bahawa lebih daripada satu petisyen pergulungan syarikat boleh difailkan terhadap sesebuah syarikat. Aturan 33 Kaedah-kaedah Pergulungan Syarikat 1972 ('kaedah-kaedah tersebut') juga membenarkan penghutang itu sendiri digantikan sebagai pempetisyen yang lemah. Petisyen pergulungan juga tidak menyalahi s. 224 Akta Syarikat 1965 kerana ianya bukan satu pelaksanaan dan tidak berdasarkan kepada mana-mana keputusan mahkamah tetapi kepada ketidakupayaan sesebuah syarikat untuk membayar hutangnya.

[4] Tidak ada apa-apa dasar untuk membenarkan pergantungan pelaksanaan kepada petisyen tersebut kerana penghakiman yang dipohon untuk mencabarnya tidak berjaya dirayui di Mahkamah Agung dan tidak terdapat pertikaian *bona fide* berdasarkan kepada dasar-dasar yang teguh jika dilihat kepada latarbelakang fakta kes ini.

[5] Walaupun kaedah-kaedah tersebut mengkehendaki kebenaran afidavit diangkat sumpah selepas petisyen, mahkamah mungkin tidak akan mengendahkan ketidakpatuhan prosidur tersebut demi kepentingan keadilan, lebih-lebih lagi dalam kes dimana tidak terdapat persoalan ketidakadilan yang serius terhadap seseorang.

[6] Kuasa untuk membenarkan pindaan adalah budibicara yang akan digunakan secara liberal demi kepentingan keadilan. Dalam kes ini, mana-mana tribunal yang munasabah juga akan melakukan perkara yang sama.

[7] Perkara utama untuk menyoal balas adalah untuk menentukan ketepatan sesuatu penghakiman terus yang diperolehi terhadap perayu dan dicabar pada peringkat rayuan. Ini merupakan satu cubaan untuk membuka semula perkara yang sudah ditamatkan dan oleh itu jelas merupakan satu penyalahgunaan kuasa mahkamah.

Oleh Hamid Mohamad HMR

[1] Satu kecenderungan yang tidak sihat dikalangan penentang-penentang dalam kes petisyen pergulungan syarikat adalah dengan memasukkan berbagai permohonan interlocutori yang menghalang kelancaran pendengaran sesuatu petisyen. Oleh yang demikian sudah tiba masanya mahkamah menentang secara tegas amalan ini.

[Rayuan-rayuan ditolak; permohonan pergantungan pelaksanaan sementara menunggu kebenaran untuk rayuan di Mahkamah Agung ditolak.]

Case(s) referred to:

Antara Elektrik Sdn Bhd v. Bell & Order Bhd [2000] 6 MLJ 385 ***(refd)***

Asia Commercial Finance (M) Bhd v. Lum Choon Realty Sdn Bhd (Companies Winding-up No: 28-60-92) ***(refd)***

Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Sdn Bhd [1999] 4 CLJ 135 ***(refd)***

Hendry v. De Cruz [1949] MLJ Supp 25 ***(refd)***

Hunter v. Chief Constable of West Midlands & Anor [1981] 3 All ER 727 ***(foll)***

In re Kredin Sdn Bhd (Companies Winding Up No: 28-55-89) ***(ovrd)***

Ladli Parshad Jaiswal v. Karnal Distillery Co Ltd [1954] 24 Comp Cas 77 ***(foll)***

Lai Yoke Ngau & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(foll)***

Miliangos v. George Frank (Textiles) Ltd [1975] 1 All ER 1076 ***(foll)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 ***(foll)***

Nicholls v. Nicholls [1997] 147 NLJ 61 ***(foll)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 ***(foll)***

Re Norton Iron Co [1877] 47 LJ Ch 9 ***(refd)***

Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12 ***(refd)***

SP Setia Bhd v. Gasing Heights Sdn Bhd [2001] 6 CLJ 55 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078 ***(foll)***

Stonegate Securities Ltd v. Gregory [1980] 1 All ER 241 ***(foll)***

Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd [2000] 4 CLJ 72 ***(refd)***

Taylors Industrial Flooring Ltd v. M & H Plant Hire (Manchester) Ltd [1990] BCLC 216 ***(foll)***

Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258 ***(foll)***

Young v. Bristol Aeroplane Co Ltd [1944] 1 KB 718 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 4, 218, 219(2), 224, 253(2)
Courts of Judicature Act 1964, ss. 43, 44(1), 67(1)
Companies (Winding-up) Rules 1972, rr. 32, 33
Rules of the High Court 1980, O. 18 r. 19

For the appellant - Cecil Abraham (T Gunaseelan with him); M/s Jayaraman Ong & Co
For the respondent - Lambert Rasa-Ratnam (Sean Yeow with him); M/s Lee Hishamuddin

Reported by Anne Khoo

JUDGMENT

Gopal Sri Ram JCA:

Preliminary

There are several appeals that are being disposed of by this judgment. They all arise out of the same dispute. It has to do with an order of winding up made against the appellant company. A few words first about how we came to hear these appeals.

On Monday, 2 April 2001, a company called Anafartalar Caddesi Sdn. Bhd moved us on an application for stay of execution of a winding up order made against the appellant. It is a contributory of the appellant. After a short argument, we permitted the applicant company to be added as a co-appellant and directed the cause papers before us to be amended to reflect this. We also granted a stay of execution pending appeal. Since the matter was of some importance to the parties, it was by consent ordered that the motion for stay be treated as the appeal proper. Leave was then given to the appellants to formally lodge and serve its memorandum of appeal by 11am the following day *sans* any supporting documents. The parties before us, including the supporting creditors were given liberty to put in one affidavit to complete the record if necessary. We then fixed the appeal for hearing on 5 April 2001.

Standing To Apply For A Stay

As I said earlier, the applicant is a contributory of the appellant. It had taken no part in the proceedings in the court below. Yet it was moving us for a stay. Now that sounded to me to be a bit odd. I would have thought that the proper party to make such an application was the appellant itself. I said so during argument. We were then told that the appellant had indeed made a similar application earlier. But it had withdrawn it on the

strength of a decision by another division of this court. That decision was to the effect that it was not competent for a company that had been wound up to make an application to stay execution of the winding up order.

I must be forgiven if I express my strong dissent against any such view. Both principle and the weight of authority are against it. So far as principle is concerned, one need only refer to the relevant statutory provisions.

First, there is s. 253(2) of the Companies Act 1965. It reads as follows:

> Subject to the rules an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the Court in cases within its ordinary jurisdiction.

For completeness, I would mention that the expression "court" is defined by s. 4 of the Companies Act as meaning the High Court or a judge thereof.

Next, there is s. 67(1) of the Courts of Judicature Act 1964 which provides as follows:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

Lastly, there is s. 44(1) of the Act of 1964 which provides as follows:

> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

Applying these sections to a case as the present, the following conclusions result. First, that a company that has been ordered to be wound up has a right to appeal against that order. Second, that after lodging its notice of appeal, the company is entitled to apply to the Court of Appeal for a stay of the winding up order in the ordinary way. In other words, incorporated into the right to appeal against a winding up order is the further right to apply for all ancillary relief that is open to an appellant taking advantage of the system. Of course, before applying to us, it is necessary for an appellant to move the High Court first. (Section 43 of the Courts of Judicature Act 1964.)

So far as authority is concerned, one need look no further than the judgment of that very learned judge, Hashim Yeop A. Sani CJ (Malaya) in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd.* [1991] 3 CLJ 2078. After a discussion of the cases that hold that a board of directors exercises residuary powers to instruct solicitors to lodge an appeal despite the making of a winding up order, the learned Chief Justice of Malaya said:

> After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s. 253(2) of the Act. The only question is who should move the appeal on behalf of the company.
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> An earlier decision of this court in *Rajannan s/o Ravaniah & Ors v. Sivalingam s/o Arumugam Karuppiah* (Civil Appeal No 02-41-1990) (unreported) is to be distinguished. There the notice of motion for stay and the supporting affidavits were filed by the directors and shareholders of Tamil Osai Sdn Bhd, the company, and they together with the company filed a motion for stay of the winding-up order pending appeal. The application for stay was allowed by this court although the appeal itself was subsequently dismissed.

I am most conscious of the doctrine of precedent that binds us. Generally speaking, a decision of one Division of this Court is binding on another. See, *Hendry v. De Cruz* [1949] MLJ Supp 25. But this is not an absolute rule. Otherwise, we will be affirming decisions that occasion injustice and are plainly wrong under the artificial umbrella of the doctrine of precedent. In departing from our previous decisions we act on the third exception laid down by Lord Greene MR in *Young v. Bristol Aeroplane Co Ltd* [1944] 1 KB 718, namely, that the previous decision was given *per incuriam.* See also *Miliangos v. George Frank (Textiles) Ltd* [1975] 1 All ER 1076, 1084:

To conclude this point, it is in my judgment beyond argument that a company which has been ordered to be wound up has the right to appeal against such an order and to make any and all applications within the appeal, including an application for a stay of the winding up order. Any decision to the contrary is wrong and should not be followed.

In the present case, strong objection was taken by counsel for the respondent as to the maintainability of the application by the applicant company. It was said that the applicant had no standing to make the application because it was not a party to the proceedings. I do not propose to deal with any of the arguments advanced in opposition to the stay. They

fell by the way-side once we directed that the applicant be added as a party to the appeal. But I will say this. If we had taken a purely legalistic approach to this part of the case on the invitation of counsel for the respondent, great injustice would have befallen the appellant. It would have meant that acting upon a wrong precedent of this court, the appellant would have no right to apply for a stay and neither would any contributory. We cannot stand by idly and watch such an injustice pass us by. We must act. And we did.

The Appeals

I now turn to address the principal arguments addressed on the several appeals before us. I will summarise these. There is the main appeal against the order winding up the appellant. Next, there is the appeal against the order by the judge declining to stay the winding up petition on the ground that there were two suits in which the appellant sought to impeach the judgment and order for sale that had been obtained against the appellant. There is also an appeal against the decision of the judge granting an amendment to the respondent's petition. The fourth appeal is against the judge's refusal to strike out the petition. Lastly, there is the appeal against the judge's refusal to order cross-examination of the deponent of the respondent's affidavits. Before I deal with the arguments raised on each of these appeals, there is something that needs be said by way of a general observation as well as in particular about the conduct of the appellant's case in the court below.

There is a trend – and it is an unhealthy trend – for practitioners to raise several points either on several different applications or by way of preliminary objections on procedural grounds to the same proceeding. As each application or point of objection fails, an appeal is at once lodged and the aid of this court is sought to stay all proceedings in the court below pending the hearing of the appeal against the spurious procedural objection. Let me say at once that such a practice constitutes an abuse of the court's process, leads to injustice and should not be countenanced by judges. A litigant who has a number of procedural and substantive grounds in opposition to any cause or matter must take all of them in one go. He cannot present his case in instalments. He cannot take one procedural point at a time and invite a separate ruling from the presiding judge. This type of advocacy which has been on the rise over the past few years results in serious delays in the various stages of litigation. Judges at first instance and magistrates are therefore advised not to entertain these so-called preliminary objections save and except where they go to the jurisdiction of the particular court.

Take this very case. Each appeal before us is directed against each of the steps taken by the appellant to resist the winding up petition. Yet, all these objections could have been taken on a single application under two broad categories of procedural and substantive grounds of opposition to the respondent's petition. There would then have been just one judgment of the High Court dealing with all the points taken and just the one appeal but mounted on several grounds. I must therefore say with much regret that the case for the appellant was handled most poorly in the court below.

The Appeals Proper

I propose to deal with these appeals on two broad grounds: those based on substance and those based on procedure.

(A) The Substantive Grounds

(i) The Two Petitions Argument

The main ground of complaint is that there was, at the date on which the respondent presented its petition, already in existence another petition presented much earlier by another creditor. That creditor had been substituted by the Overseas Chinese Banking Corporation Ltd. ("OCBC") and was represented before us by Mr. Porres Royan, of counsel. The argument here is twofold. First, that a second petition is bad as a matter of law. Secondly, that the presentation of two petitions constitutes an abuse of process. Mr Cecil Abraham cited two cases in support of these arguments. The first of these is an unreported judgment of VC George J, given at first instance in *In re Kredin Sdn. Bhd.* (Companies Winding Up No. 28-55-89) where the learned judge expressed the following view:

> In my judgment when a petitioner is not entitled to present a petition or where the petition cannot be presented while an investigation as to the petitioner's entitlement to present the petition is pending, then in either case r. 33 may and should be invoked by any other person entitled to present the petition and who is desirous of proceeding with it. The lesser would fall within the greater.
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> The courts have always abhorred multiplicity of proceeding which rule applies to petitions. As has been seen, the whole point of the requirement that notice of the hearing of the petition be advertised is to give notice to the world of the fact of the petition and of, its date of hearing so that all interested parties could attend at the hearing and support or not support it, in any event be heard on it. One reason for this is to prevent multiplicity of petitions against the same company. Apart from the general inconvenience of having multiple petitions there is the question of costs. Having separate petitions would be to subject the company to separate sets of costs, one in respect of each petition.

Mr. Rasa Ratnam for the respondent has argued that r. 33 of the Companies (Winding Up) Rules does not say that more than one petition may not be presented. He says that the rule is merely permissive. He also argues that VC George J did not hold the second petition to be bad in law. In any event the reasons given by that learned judge for holding that the presentation of more than one petition is frowned upon for multiplicity are wrong. Counsel's final point is that VC George J, misinterpreted the English cases he relied on in support of his conclusion, in particular *Re Norton Iron Co*. [1877] 47 LJ Ch. 9. I find myself persuaded by these arguments. My reasons are reflected sufficiently from the judgment of the second authority cited to us by Mr. Abraham. Contrary to his argument, it is a decision that clearly supports Mr. Rasa Ratnam's submission. The case is *Ladli Parshad Jaiswal v. Karnal Distillery Co. Ltd.* [1954] 24 Comp. Cas. 77, where at p. 81, Dulat J, discussed the English cases on the point:

> Mr. Khanna appearing for the respondent while admitting that two or more identical suits by the same person were maintainable even in the same court contended that the case of winding up applications is peculiar, and that once a winding up application has been filed and it is a *bona fide* application a second application of the same kind for the winding up of the same company does not lie. He was unable, however, to support this argument either on the basis of any principle of law or any authority. Mr. Khanna did refer to three English decisions, *In re Joint Stock Coal Company* [1869] LR 8 Eq. 146, *In re Norton Iron Company* [1877] 47 LJ Ch. 9 and *In re Building Societies' Trust Limited* [1890] 44 Ch. D 140 but none of these afford any assistance to his argument. In these cases the question mainly was of costs. In *In re Joint Stock Coal Company* there were two petitions for the winding up of the same company and both failed because neither disclosed any good ground for a winding up order. The learned Vice-Chancellor disposes of the merits of the two petitions at page 153 of the report and then after considering another question proceeds to consider the matter of costs at page 154 and decides
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> > As to the second petition, by the shareholders of Norwich, I am not sure if theirs had been the original petition for winding up that I should have dismissed it with costs because they have a fair ground of complaint in the discontinuance of the Norwich depot. But when it is considered that Green's petition had already been presented and that the Norwich shareholders well knew all that was being done, there was no excuse under the circumstances for presenting a second petition, and it must consequently be dismissed with costs.

It will be noticed that the second petition was not dismissed because of the existence of the first petition. In the next case *In re Norton Iron Company* the second petition was dismissed because the first was allowed and a winding up order was made on that first petition. In the last case *In re Building Societies' Trust Limited*, again one of the petitions was allowed and the other thereupon dismissed. It is clear therefore that in none of these cases was a winding up petition dismissed merely because another winding up petition of the same kind was awaiting decision. This matter concerning the position of several petitions for the winding up of the same company was considered in *In re European Banking Company: Ex parte Baylis* [1866] LR 2 Eq. 521 and Sir RT Kindersley VC, observed:

> However desirable it is to avoid a number of petitions being presented for the winding up of a company, I am not aware of any rule having been established with a view to limit the number of them. But still every one of these petitions ought to be looked at separately upon its own merits as if it were the only petition presented.

It is not shown that this view has been departed from in the English courts. There is thus no authority for concluding that the appellant's petition for the winding up of this company is not maintainable because a previous petition by him of a similar kind is pending and has not yet been decided. On general grounds too there appear several considerations why the appellant should not be debarred from seeking his remedy in this court merely because another court of competent jurisdiction is yet considering a similar prayer by him. The company in question is admittedly an Indian company and as from the date of the partition the responsibility for deciding disputes connected with its affairs rests on this court. If therefore a party seeks relief from this court in connection with such a dispute feeling that he can obtain effective relief from this court alone such relief ought not to be refused on any but substantial ground. The old maxim of law is that a Judge must extend his jurisdiction, which of course does not mean that he should usurp jurisdiction where none exists but does mean that he ought to amplify as far as possible the remedies he can grant.

There you have it. I require no clearer authority for the proposition that more than one winding up petition may be presented against a company. Of course, the provisions of r. 33 is available to a petitioning creditor. And if he does not take advantage of that rule to have himself substituted for a lethargic petitioner, he may find himself out of pocket for his costs. But on no account is his petition bad in law. Nor is it an abuse of the court's process.

Mr Abraham sought to feebly argue that the respondent's petition comes within s. 224 of the Companies Act. That section strikes down any attachment, sequestration, distress or execution against the assets of a company after the commencement of a winding up. And s. 219(2) deems

winding up to have commenced at the time of presentation of the petition for the winding up. Counsel seeks to rely on the judgment of Lord Denning M.R. in *Re Overseas Aviation Engineering (GB) Ltd* [1962] 3 All ER 12 where he said:

> 'Execution' means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is 'completed' when the judgment creditor gets the money or other thing awarded to him by the judgment.

But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Companies Act. But the issuance of such a notice is not a *sine qua non* for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. There are two cases that support this view.

In *Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn. Bhd.* [1989] 1 CLJ 258, Abu Mansor J (as he then was) said (at p. 260):

> After hearing arguments I came to the conclusion on the facts before me the sole issue is whether Maharani is unable to pay its debt and therefore should be wound up. On such examination of the facts the evidence is overwhelming that the respondent Maharani is unable to pay its debt. I find as a fact that the petitioner has proved to my satisfaction that Maharani was unable to pay its debt and in so determining I am allowed to do so by taking into account the contingent and prospective liabilities of the company Maharani. As has rightly been pointed to by the petitioner's counsel as per encl. 63, Maharani's debt according to the list of supporting creditors amounts to $100,000. To this must be added the amount he owed the opposing creditor, his landlord, $40,000. The distress realised is only $61,000. Because of this amount it has never been really disputed by the opposing creditor that Maharani is insolvent but what the objection consists of is that there was sufficient to pay Ban Heng Hong and by that yardstick Maharani is able to pay its debt and we shut our eyes to the other creditors in the list. To take that view is in my view unreasonable and unjust.
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> As for the contention that no proper notice under s. 218(2)(a) of the Act has been given I find in this case that the notice is in the circumstances unnecessary and I order that it be dispensed with as the petition is not wholly founded under s. 218(2)(a) of the Companies Act. I am of the view that s. 218(2)(a), (b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the court on any of the grounds (a), (b) or (c).

In *Taylors Industrial Flooring Ltd. v. M&H Plant Hire (Manchester) Ltd.* [1990] BCLC 216, a winding up petition was presented and prosecuted despite the absence of a notice under the English equipollent to s. 218 of our Act. The following passage in the judgment of Dillon LJ at p. 219 of the report is especially instructive:

> There is no requirement that a creditor must serve a statutory demand. The practice for a long time has been that the vast majority of creditors who seek to petition for the winding up of companies do not serve statutory demands. The practical reason for that is that if a statutory demand is served, three weeks have to pass until a winding-up petition can be presented. If, after the petition has been presented, a winding-up order is made, the winding up is only treated as commencing at the date of the presentation of the petition; thus, if the creditor takes the course of serving a statutory demand, it would be giving the company an extra three weeks' grace in which such assets as the company may have, may be dissipated in attempting to keep an insolvent business afloat, or may be absorbed into the security of a debenture holder bank. So there are practical reasons for not allowing extra time, particularly where commercial conditions and competition require promptness in the payment of companies' debts so that the creditor companies can manage their own cash flow and keep their own costs down.

There is therefore no merit at all in the weak suggestion by Mr. Abraham that the presentation of the second petition by the respondent offends s. 224 of the Companies Act.

This head of argument therefore fails.

(ii) The Stay And Striking Out Arguments

The other substantive ground relied upon by Mr. Abraham is that the petition ought to have been struck out or stayed by reason of two suits filed by the appellant impeaching the judgment on which the petition is based and the order for sale made against the appellant. The principles upon which a court acts in such a case are not in doubt. They are set out in two cases of primary importance.

In *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241, Buckley LJ said (at p. 243):

> Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending on whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective by reason of the proviso in s. 224(1), proviso (c). If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in

> the normal way. *But if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained.* That is because a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed. (emphasis added.)

The other case is *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 95, where at p. 97 Hashim Yeop A. Sani, CJ (Malaya) said:

> There are many tests to be applied to see whether a petitioner for a winding-up order has *locus standi.* Insolvency is always a ground relied on in a petition. *Prima facie* an unpaid creditor is entitled to petition for a winding-up order against a company which fails to pay its debt. Macpherson says that the only test which seems capable of resolving all difficulties is that suggested by Crossman J in *Re North Bucks Furniture Depositories Ltd* [1939] 2 All ER 549, namely, that the term 'creditor' 'includes every person who has the right to prove in winding-up'.
>
> Looking at the grounds given in the petition in the instant case it is clear to us that the petition should not have been struck out in limine and should have been heard on its merits. This was the approach of this court in *Chip Yew Brick Works Sdn Bhd v. Chang Hee Enterprise Sdn Bhd* [1988] 2 CLJ 424.
>
> The appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not.
>
> Relevant to this appeal is that part of the judgment in *Chip Yew Brick Works Sdn Bhd* [1988] 2 CLJ 424 which appears at p. 425:
>
> > Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

In the present instance, the judgment sought to be impeached was obtained on a hotly contested summons for judgment. It was unsuccessfully appealed to the Supreme Court. Despite all this, the first suit was filed in 1992 and the second in 1997. The application to stay the petition was taken out in April 2000, after the High Court had fixed the petition for hearing in the presence of all counsel. In these circumstances, can anyone blame Mr. Rasa Ratnam when he questions the *bona fides* of the appellant? I think not. It

follows from what I have said thus far that there is in this case no *bona fide* dispute based on substantial grounds.

As submitted by counsel for the respondent, this appellant has a history of questioning judgments after they are entered on summonses that are seriously contested. If what the appellant is seeking to do here is not an abuse, I cannot see what is.

Mr. Abraham retorts that the suits had been fixed for hearing by Saari J and that they did not go on only because that learned judge was elevated to this court. But what counsel overlooks is the fact that there was an application by the respondent pending in each of these suits to strike them out. With respect, having regard to the history of this matter, greater justice would have been done if these applications had been fixed for hearing and disposed of. I am confident that if the learned judge had properly addressed his mind to the facts and background to the two suits, he would have entertained serious doubts as to their *bona fides*. And it was incumbent for him to have regard to the history of the dispute to see if there was anything to try at all. The decision of the Supreme Court in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 exemplifies the role of a court in a case such as the present.

(B) The Procedural Objections

(i) Affidavit Preceding Petition

This objection is particularly curious. The affidavit of truth shows that it was sworn an hour or so before the petition. Mr. Abraham says that this is bad because the rules require the affidavit of truth to be sworn after the date of the petition. He argues that there was no petition in existence when the affidavit was sworn. So the entire proceedings are bad. There are dicta in some cases which support the view canvassed by Mr. Abraham. But these are cases decided before the landmark judgment of Lord Woolf MR in *Nicholls v. Nicholls* [1997] 147 NLJ 61 which was applied by Mohammed Azmi FCJ in *Lai Yoke Ngau & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305. I quote from the latter case (at p. 314):

> Although under O. 2 r. 1(1) of the Rules of the High Court 1980, non-compliance with the rules of procedure is to be regarded as mere irregularity and not a nullity, the court, like any other discretionary powers, must exercise its discretion to cure such procedural irregularity on correct principle. The proper approach that should be adopted on curability should be on the basis of the principle laid down recently by Lord Woolf MR in *Nicholls v. Nicholls* [1997] The Times, 21 January; 147 NLJ 61 on the exercise of the discretion conferred by the English RSC O. 59 r. 10(3) and s. 13(3) of the Administration of Justice Act 1960:

I have cited extensively from the previous authorities to indicate that they show no common pattern of approach. The later cases do however make it clear that it is now recognised that O. 59 r. 10(3) and s. 13(3) of the 1960 Act do give a court the power to rectify procedural defects both in the procedure leading up to the making of the committal order and after a committal order has been made. *Like any other discretion, the discretion provided by the statutory provisions, must be exercised in a way which in all the circumstances best reflects the requirements of justice.* In determining this, the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today, it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor.

The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical ground which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.

In the future therefore it should not be necessary to revisit the authorities prior to the decision in *M v. P Butler and Butler*. It should be recognised that O. 59 r. 10 and s. 13(3) of the 1960 Act give the court a discretion which they are required to exercise. To decline to exercise that discretion because of a technical error in the notice of application to commit or the committal order itself, in the absence of any prejudice, is to derogate from that discretion.

On the basis of the above principle, the discretion available to this court to cure irregularities under O. 2 r. 1(1) of the RHC read together with s. 69(4) of the Courts of Judicature Act 1964 (the equivalent of the English O. 59 r. 10(3)) and as well as s. 101 of the same Act which allows this court to discount 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court', should only be undertaken by the court in the absence of prejudice. Thus defects affecting merits or the jurisdiction of the court ought not to be cured, in the exercise of the discretionary power. (emphasis added.)

Now, the observations of the Master of the Rolls in *Nicholls v. Nicholls (supra)* were made in the context of a case of contempt of court where the liberty of the subject is at stake. If in those circumstances, procedural irregularities are to be overlooked in the interests of justice, then a *fortiori* in case as the present where there is no question of such a serious consequence. In my judgment, the fact that the affidavit pre-dated the petition by hours or even days does no injustice to anyone. There is accordingly nothing in this point.

(ii) Amendment Of Petition

There are really two points here. First, that the amendment ought not to have been granted. There is a short answer to this argument. The power to amend is discretionary. It is to be exercised liberally in the interests of justice so that the real issues may be placed before the court. An appellate court does not interfere in such cases unless there is a misdirection. Having reviewed the material, I am satisfied that any reasonable tribunal similarly circumstanced would have come to the same conclusion and granted the amendment.

The second point here is that the amended petition was not annexed to the affidavit of truth. Mr. Rasa Ratnam says that that is not quite correct. In my view, even if there had been an omission (which there is none here) it is not fatal. The interests of justice are not thwarted by such procedural departures.

It follows that this ground fails.

(iii) The Refusal To Permit Cross-Examination

There is a complaint that the judge declined to permit cross-examination. This ties in with the summons to stay the petition on the ground that there are those two suits which I mentioned earlier in this judgment. Again, this turns on the question of *bona fides*. The subject matter on which the cross-examination was to be directed had to do with the correctness of the summary judgment entered against the appellant and tested at the appellate level. The application to cross-examine was therefore clearly an abuse of the court's process. What was being proposed was a re-opening of a cause that had been disposed of to finality. Such a step is usually classified by the courts as an abuse of its process. See, *Hunter v. Chief Constable of West Midlands & Anor* [1981] 3 All ER 727.

The decision whether or not to order cross-examination was within the discretion of the primary judge. He exercised it in a particular way. On the available material, any reasonable tribunal similarly circumstanced would have arrived at the same decision.

There is therefore no merit in this head of argument.

Conclusion

After careful consideration of the arguments addressed to us, I came to the conclusion that all these appeals are without merit and should fail. My learned brothers agreed with my views. Accordingly, at the conclusion of arguments all the appeals were dismissed and those orders made that are usually consequent upon a dismissal.

Postscript

After we had dismissed all these appeals, Mr. Abraham applied for a stay of execution pending an application for leave to the Federal Court. That was refused as well.

Abdul Hamid Mohamad JCA:

I have had the advantage of reading the judgment of my learned brother Gopal Sri Ram JCA. I agree entirely with his views. However, I only wish to add a few words to further emphasise my unhappiness (and his too) about the way winding-up petitions are often conducted. Indeed what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn. Bhd. v. Filotek Trading Sdn. Bhd.* [1999] 4 CLJ 135, *Antara Elektrik Sdn. Bhd. v. Bell & Order Berhad* [2000] 6 MLJ 385, *Sun Microsystems Malaysia Sdn. Bhd. v. K.S. Eminent Systems Sdn. Berhad* [2000] 4 CLJ 72 and recently *SP Setia Berhad v. Gasing Heights Sdn. Bhd*. [2001] 6 CLJ 55.

As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r. 32 of the Companies (Winding-up) Rules 1972 was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court – see *Asia Commercial Finance (M) Berhad v. Lum Choon Realty Sdn. Bhd* (Penang High Court Companies Winding-up No: 28-60-92). Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay

all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedure adopted in winding up proceedings is the application to strike out the petition under O. 18 r. 19 of the RHC 1980 and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn. Berhad* [1999] 4 CLJ 135 I pointed out the undesirability of applying such procedure to a winding up petition:

> Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding-up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.
>
> The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.
>
> Furthermore, more often than not, resort to O. 18 r. 19 of RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.
>
> In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

These views were reiterated in *Antara Elektrik Sdn. Bhd v. Bell & Order Bhd* [2000] 6 MLJ 385 this time in Malay.

In *Sun Microsystems Malaysia Sdn. Bhd* [2000] 4 CLJ 72, I stressed the difference between the procedure in respect of a writ action under the RHC 1980 and a winding-up petition under the Companies (Winding-up) Rules 1972:

> It is important to note that the procedure in a winding-up proceeding as provided by the Companies (Winding-Up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of a High Court 1980 (RHC 1980). In a winding up proceeding, the procedure is simple and brief. That is what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.
>
> On the other hand, in a writ action upon filing no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:
>
> > We command you that within eight days after the service of this writ on you, inclusive of the day of such service, **you do cause an appearance to be entered for you** at the suit of ... And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution. (emphasis added.)
>
> The trial date is a long way off. Indeed, there may not be none at all.
>
> It is important that the procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc. in a winding up proceeding.

Finally, the same view was reiterated in *SP Setia Berhad* (Kuala Lumpur High Court Winding-up Petition No: D8-28-173-2000).

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practice, which, at the very least is delaying the hearing and disposal of winding-up petitions, which is unfair to the petitioners and clogging the court docket.